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Nos. 77-1465 and 77-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

GENEVIEVE O. RASMUSSEN and WILLIAM C. RASMUSSEN, JR.,

Respondents.

GEO CONTROL, INC. and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and WILLIAM C. RASMUSSEN, JR.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTION PRESENTED

What is the maximum death benefit payable to survivors of deceased workers under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972?

STATUTES INVOLVED

1. Immediately prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. 906(b) (1970 ed.):

> Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That, if the employee's average weekly wages, as computed under section 10 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. 909 (1970 ed.):

If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such

wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.* * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in pertinent part:

Section 6(b), (d), 33 U.S.C. 906(b), (d) (Supp. V):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

> (A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.
>
> (B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.
>
> (C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.
>
> (D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable

national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. 909 (Supp. V):

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased,

during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

* * * * *

Section 10(f), 33 U.S.C. 910(f) Supp. V):

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arrising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

STATEMENT

On May 11, 1973 William C. Rasmussen was in the employ of Geo Control Incorporated, as a hydrologist under a public work contract between Geo Control and the United States in South Vietnam. Under the provisions of the Defense Base Act, 42 U.S.C. §1651 *et. seq.*, South Vietnam is in the 15th Compensation District; the employment was covered by the Defense Base Act and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et. seq.* (Supp. V).

Geo Control's liability for compensation under the Act was covered by insurance provided by the New Hampshire Insurance Co.

On May 11, 1973 Rasmussen, while performing services for Geo Control, received fatal injuries while traveling as a passenger in a jeep which triggered a land mine explosion, and his death arose out of and in the course of his employment. At the time, Mr. Rasmussen's average weekly wage was $798.00 per week.

As surviving widow Genevieve O. Rasmussen is entitled to death benefits in her own behalf beginning May 11, 1973 and continuing pursuant to the provisions of the Act.

William C. Rasmussen, Jr. born on October 17, 1955 was and is the surviving child of the employee and as of May 11, 1973 was and is entitled to death benefits to continue until his 18th birthday on October 17, 1973 and thereafter until his 23rd birthday on October 17, 1978 so long as he qualifies as a student as defined by the Act.

On October 18, 1973 Deputy Commissioner Donald C. Reichart entered a compensation order and awarded death benefits.

As of October 17, 1973 benefits payable to the son were terminated because he had reached the age of 18. At the

same time the widow's portion was determined by the carrier to be $125.25 per week plus a cost of living increase, required by Section 10(f) (6.49%). The total amount payable to the widow according to the carrier was $133.00 weekly, Appendix C, Federal Petitioner's Petition for a Writ of Certiorari herein, p. 33A.[1] Thereafter on December 5, 1973 by letter, Deputy Commissioner Reichart informed the carrier that compensation was to be paid in bi-weekly installments and that "information has been received you are compensating Mrs. Rasmussen at a rate of $133.00 per week rather than the $167.00 as awarded. Please correct this and advise." *Id.*

Despite the direction of the Deputy Commissioner as of April 2, 1974 the carrier was making weekly payments in the total amount of $133.00 to the widow. *Id.* Thereafter, the dispute was referred to an administrative law judge for hearing.

On October 24, 1974 Administrative Law Judge William B. Devaney, U.S. Department of Labor, issued a Decision and Order. Judge Devaney's 39 page opinion exhuastively reviewed the legislative history immediately preceding the 1972 amendments to the Act. At page 31 of his Decision and Order, Fed. Pet. at p. 63A, Judge Devaney concluded that, "Congress in amending Section 9(e) of the Act intentionally and with full awareness of the limitation provided in Section 6(b)(1) of the Act as to disability compensation, removed the arbitrary limitation previously applied to compensation for death and instead provided that death benefits should be a percentage of the average weekly wages of the deceased provided only that the total weekly benefit shall not exceed 66 & 2/3% of the average weekly wages of the deceased." Therefore, Judge Devaney ordered that the widow was entitled to a death benefit of 50% of the employee's average weekly wage of $798.00 from May 11, 1973 and the son was entitled to a death benefit of 16 &

[1] Hereinafter this Petition will be referred to as "Fed.Pet."

2/3% of the employee's average weekly wages of $798.00 from the same date, for a total weekly benefit of $532.00.

Petitioners Geo Control, Inc. and New Hampshire Insurance Company filed a Notice of Appeal with the Benefits Review Board, U.S. Department of Labor on or about November 22, 1974. On April 3, 1975 the Benefits Review Board, Washington, Chairperson, Hartman and Miller, members, issued a Decision. Appendix B, Fed. Pet. The Board concluded "that the Administrative Law Judge correctly determined that the maximum limit on disability compensation according to the provisions of 6(b)(1) of the Act does not apply to death benefits awarded under Section 9(b), [33 U.S.C., Secs. 906(b)(1), 909(b)]." *Id.* pp. 19A, 20A.

The Court of Appeals for the Ninth Circuit affirmed the Board's decision. *Director, Office of Workers' Comp. et al v. Rasmussen*, 567 F.2d 1385 (1978). The Court concluded "that Petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitation on death benefits" from the Longshoremen's and Harbor Workers' Compensation Act. Appendix A, Fed. Pet. p. 14A.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals held that Congress in its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "the Act") knowingly and intentionally removed any arbitrary ceiling on death benefits, and consciously chose to treat such recipients in a manner different from those receiving disability benefits.

This ruling is fully supported by the legislative history. From the beginning of the Congressional hearings on these amendments the elimination of maximums from disability and death benefits was proposed. The bill representing this viewpoint removed such maximums by eliminating all reference to maximums from the statute. During the

hearings, this proposal received a substantial amount of attention from witnesses, some of whom favored the proposal and others of whom opposed it.

The Report of the National Commission on State Workmen's Compensation Laws, which is mentioned in the legislative history, recognized that there are valid reasons for treating death benefit recipients in a different, more favorable way than disability benefit recipients, and this point was noted by the Ninth Circuit. Further, the National Commission recommendations of death benefit maximums are minimum recommendations only.

Section 6(d) of the Act does not contain a death benefit maximum. To read such a maximum into Section 6(d) is to write words into the section that are not there. Such activity is a legislative function to be avoided by the judiciary. The purpose of Section 6(d) is to explain that only permanent total disability and death benefit recipients are to receive the benefit of a national average weekly wage that increases from period to period.

The Ninth Circuit decision is fully supported by the rules of statutory construction and case law. The Act is beneficent in nature and humanitarian of purpose, and is to be liberally construed with such purpose in mind. Further, doubts concerning such statute are to be construed in favor of the injured employee and his family.

The Ninth Circuit notes that the 1972 amendments to the Act have the further effect of favoring death benefits over disability benefits in some situations involving minimum benefit levels. Such a result is further evidence of Congressional intent to treat the two classes of benefits differently.

Finally, it would have been very simple for Congress to have clearly and unequivocally made the Section 6(b)(1) maximums applicable to death benefit cases. The Congress did not because that was not its intention.

ARGUMENT

I. LEGISLATIVE HISTORY ESTABLISHES THAT THE CONGRESS INTENDED TO REMOVE DEATH BENEFIT DOLLAR MAXIMUMS FROM THE ACT

A. Congressional Hearings and Proposed Amendments

On May 2, 1972 the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare convened to consider amendments to the Act. Senators Thomas F. Eagleton, Chairman, and Jacob Javits were present. In his opening remarks, Senator Eagleton said, in part,:[2]

* * * * *

> The bills pending before us will improve the benefits. S. 2318 which I co-sponsored with Senator Williams *would eliminate the maximum payment limitations.* It would also provide for the Secretary of Labor to make an annual calculation of the increase in wages so as to upgrade the benefits for those already on disabillty from year to year.
>
> The second bill, S. 525, introduced by the late Senator Prouty at the request of the Administration would also increase the benefits *although retaining a maximum limitation.*

* * * * * *

S. 2318 set out the new maximum and minimum limits as follows:

---

[2]Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearings before the Subcommittee on Labor and Public Welfare, United States Senate, Ninety-Second Congress, Second Session on S.2318, S.525 and S.1547, at p. 2. (Emphasis supplied). Hereinafter this volume will be cited as *Hearings*.

MAXIMUM AND MINIMUM LIMITS OF
DISABILITY COMPENSATION AND ALLOWANCE

SEC. 4(a) Section 6(b) of such Act is amended to read as follows:

(a) Compensation for total disability shall not be less than $54.00 per week: *Provided,* however, that, if the employee's average weekly wages as computed under Section 10 are less than $54.00 per week, he shall receive as compensation for a total disability his average weekly wages.

* * * * *

DEATH BENEFITS

* * * * *

SEC. 10(b) Section 9(e) of such Act is amended to read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

Hearings, pp. 6, 9 and 10. From the beginning, the proffered amendments of S. 2318 to remove maximums from the disability and death benefit sections were expressed in language that eliminated all reference to a maximum and retained language only specifying the minimum benefit levels. As the following recitation shows, there was no confusion among the witnesses appearing before the Subcommittee as to the effect of those proposed amendments.

The first witness to appear before the Subcommittee was the Secretary of Labor, James Hodgson. Concerning S. 2318, he stated:

> [it] would eliminate any ceilings on compensation rates; that is, there would be no

> maximum on weekly compensation and no maximum on overall compensation payable. I don't really think it is advisable to eliminate ceilings on compensation rates.

Hearings, p. 31. Senator Eagleton pointed out that the ceilings proposed in S. 525 "almost become out of date the minute the law is passed." *Hearings*, p. 34.

Following the appearance of Secretary Hodgson, a voluminous amount of testimony was received concerning the advisability of retaining a maximum limit on death cases or to dispense with it as proposed in S. 2318. For example, the AFL-CIO supported the elimination of maximum limits in both death and disability cases as proposed by S. 2318 and stated that, ". . . it is, in our opinion, the only humane and decent manner that should be used to compute death benefits." *Hearings*, p. 87. Further, Thomas W. Gleason, President of the International Longshoremen's Association supported S. 2318 by submitting a written statement, which provided in part:

> . . . that bill would eliminate the artificial and totally unrealistic restrictions on benefit amounts. This would enable compensation awards for the first time to reflect realistically the loss of earnings suffered by injured employees. The bill would also provide for an updating of old awards to keep pace with the increase in prevailing industrial wage levels. . .

Hearings, p. 157. In addition, the setting of a maximum limit in death cases was opposed by David B. Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association, who noted that such limitations penalize the most diligent and ardent workers who are the highest paid. *Hearings*, p. 381. Moreover, the Honorable Phillip Burton, Member of Congress, 5th District of

California, appeared before the Subcommittee and testified:

> I would hope that we would favorably consider eliminating the ceiling. The ceiling is at best arbitrary and a disabled-connected benefit should be geared, I think, to the wages without regard to an arbitrary ceiling. In the event the Committee decides that there should be some ceiling, then I would submit that the Federal Employees Compensation Act — which I had some small part in construction — should be the measurement whereby the limitation on the total benefit should be drawn.

Hearings, p. 618. Frank Bonadio, President, Building and Construction Trades Department, AFL-CIO, in his statement to the Subcommittee contended that maximum limitations in benefits quickly become inadequate due to inflation. *Hearings*, p. 681. Mr. Bonadio added:

> In fact thousands of employees covered under this Act earn over $25,000.00 per year . . . In these instances present maximum benefits of $70.00 per week would amount to only about 15% of the worker's income.

Hearings, p. 681. Howard McGuran, Legislative Representative, AFL-CIO, with respect to "Maximum and Minimum Limits of Disability Compensation and Allowance", stated, in part, as follows:

> Mr. Chairman, the AFL-CIO is opposed to the weekly benefit amount proposals in S.525 because they fail to meet the fundamental goal of workmen's compensation. . . .
>
> * * * * *

> Section 8(a), (b), and (c) of the Longshoremen's Act specifies that the weekly wages replacement shall be 66 2/3 percent of the injured worker's average weekly wage, and the AFL-CIO would like to see this goal achieved.

Hearings, p. 63. With respect to "Death Benefits", Mr. McGurgan stated, in part, as follows:

> In addition, the weekly wage used to compute death benefits in other cases, would be the weekly wage of the unfortunate victims. The AFL-CIO supports this approach to the computation of death benefits. We sincerely hope the committee will adopt the proposal contained in S.2318.

Hearings, p. 65. Patrick Tobin, Washington Representative, International Longshoremen's and Warehousemen's Union, made the following comment:

> We join with the International Longshoremen's Association AFL-CIO, the District of Columbia AFL-CIO representatives, and other unions in supporting S.2318 and opposing S.525.

Hearings, p. 133. Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, in a letter to Senator Williams stated, in part:

> I would appreciate the inclusion in your records of this letter of support by the Teamsters Union for S.2318 (Longshoremen and Harbor Workers Compensation Act Amendments 1971). Similarly, we state our opposition to parallel measures S.525 (Longshoremen and Harbor Workers Compensation Act Amendments 1971) and S.1547.
>
> * * * * *

> Similarly, we must oppose S.525, for some notably regressive provisions, in what is an otherwise fair attempt at improving the work-injury protection program.
>
> * * * * *
>
> . . . Only S. 2318, we feel, approximates the much needed and progressive improvements in compensation programs already in effect in other industries.
>
> * * * * *

Hearings, pp. 700, 701. As might be expected, elimination of the ceilings was opposed by industry representatives. Ralph Hartman of the Bethlehem Steel Corporation and Edward Hood of the Shipbuilders Council of America proposed retaining a limitations provisions in both disability and death cases but at somewhat higher levels than those proposed by the Administration. *Hearings*, pp. 169-227, in particular pp. 171, 175, 182, 218. Mr. Hartman stated, in part, as follows:

> . . . The industry has an obligation to its employees, and we are aware of the fact that they are exposed to hazards and hazardous employment, and we are interested that they receive an equitable and fair loss of earnings replacement. The wage loss replacement concept is the basic underlying objective of workmen's compensation.
>
> It is on this premise that we endorse the basic concepts of S.2318, and proposed innovations or variations which we consider urgent and demanding, yet equitable to all concerned.
>
> * * * * *
>
> Of major impact and importance to the industry are the proposals to increase weekly benefits. One such proposal would amend section

6(b) of the Act by increasing the minimum weekly rate from $18 to $54 and eliminating the present maximum weekly benefit rate of $70.

We agree that the minimum rate should be increased. *However, this proposal leaves us with a weekly benefit rate of two-thirds of the employee's average weekly earnings without limitation.*

* * * * *

Hearings, pp. 170, 171. (Emphasis supplied). Mr. Hood was in agreement:

I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the Shipbuilder's Council.

Hearings, pp. 203-204. Edward D. Vickery submitted a statement on behalf of the National Maritime Compensation Committee in which he stated, in part, as follows:

Section 4 of S.525
and
Section 4 of S.2318

Increases in Maximum and
Minimum Limits of Compensation

S.525 would amend Section 6(b) to increase the maximum weekly compensation rate of $70 per week to $119 and the minimum rate from $18 to $35; and would amend Section 14(m) to increase the statutory maximum portionately (sic) from $24,000 to $40,800 for all cases other than the total permanent disability or death. S.2318 would amend Section 6(b) by removing all maximum limits on the weekly compensation rate and would increase the minimum to $54 per week; and would repeal Section 14(m) in order to remove all

monetary limits on compensation payments in all cases.

COMMENT: If the circular liability claims are eliminated, the National Maritime Compensation Committee recognizes that an increase in the maximum weekly compensation benefits is indicated, with a corresponding increase in the statutory maximum. The basic question presented by the provisions of the two bills is whether a maximum limit should be maintained on weekly compensation benefits and on all cases other than total permanent disability and death. The National Maritime Compensation Committee respectfully submits that it is of primary importance that the monetary maximum both on weekly benefit and in all cases other than those involving total permanent disability and death be maintained. . . .

* * * * *

Section 8 of S.525
and
Section 10 of S.2318

INCREASE IN DEATH BENEFITS

S.525 would increase death benefits payable to a widow from 35% to 45% and increasing compensation for the first child from 35% to 45% if there is no surviving wife. S.525 retains the weekly maximum monetary limitations on death benefits whereas S.2318 removes all limitations on the weekly maximum monetary benefits and increases the allowance for funeral expenses from $400 to $800.

COMMENT: For the reasons previously discussed in some detail in connection with Sec-

> tion 4 of both S.525 and S.2318, we respectfully submit that it is not advisable to remove the monetary maximum benefits payable per week under the Longshoremen's Act and therefore recommend that the provisions of Section 8 of S.525 be retained in this regard. . . .

Hearings, pp. 318, 334. The hearings concluded on June 5, 1972. On September 13, 1972 Senator Eagleton reported a substantially revised version of S.2318,[3] including the following language from Section 9(e):

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Legislative History, p. 43. This is the language that was subsequently enacted into law. It should be noted that this revised section was formulated following the extensive hearings concerning the advisability of removing maximums on death benefits. Since it was Senator Eagleton who chaired the hearings and who revised the wording of Section 9(e) it must be presumed that the elimination of a maximum dollar limitation in death benefits was purposely and consciously eliminated from the revised S.2318.

Accompanying the revised S.2318 was Senate Report No. 92-1125. *Legislative History*, p. 63. In compliance with Subsection 4, Rule XXIX of the Rules of the Senate, published with the Senate Report were the changes in the existing law

[3]Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S.2318, Public Law 92-576) prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, December 1972, pp. 15-61. This volume will hereinafter be cited as *Legislative History*.

made by the bill which were shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is underscored, existing law in which no change is proposed is shown in Roman):

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in Section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased.

Legislative History, p. 102. The above presentation indicates clearly that the dollar maximum and minimum limitations were removed and only a dollar minimum tied to the national average weekly wage was inserted. Limitations for death benefits were deleted.

S. Rep. 92-1125 discussed the Major Provisions of the Bill and begins with "Improvement of the Benefit Structure" at page 5. *Legislative History*, p. 67. The first item discussed thereunder was *Maximum and minimum benefit amounts*, and the Report stated, in part, as follows:

> The basic requirement of the Act is for the injured worker to receive 66 2/3% of his average weekly wage. Historically this 2/3 requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. . . .
>
> Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor . . .

The next item discussed under "Improvement of the Benefit Structure", was, *Survivor Benefits*, and the Report stated, in part, as follows:

The benefit structure for survivors is altered to provide additional benefits for widows and children. . . Section 9 of the Act (Section 10 of the bill) is amended to increase funeral benefits from the present 400 dollars to a more realistic amount of 1,000 dollars. The present Act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended Act will provide a 50 percent award to surviving wives or husbands and 16 2/3 percent to the children, subject to a maximum of 66 2/3 percent of the average weekly wages.

* * * * *

A minimum death benefit tied to the applicable national weekly wage but not to exceed the employee's average weekly wage is also provided.

Legislative History, p. 68. S. Rep. 92-1125, also set forth a Section by Section Analysis of S.2318 and provided, in part, as follows:

> *Section 10(d)* amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. *However, maximum weekly death benefits could not be more than the employee's average weekly wages.*

Legislative History, p. 84. (Emphasis supplied). S.2318 was passed by the Senate September 14, 1972. *Legislative History*, p. 139.

In the House of Representatives, Congressman Daniels of New Jersey on September 25, 1972 introduced H.R. 12006, a bill identical to the revised S.2318.

The House Report, in compliance with Rule XIII of the Rules of the House of Representatives, showed the change in §9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

Legislative History, p. 243. The House Report accompanying H.R. 12006 also stated in part as follows:

Section 10

This section amends section 9 (pertaining to compensation for death) of the Act.

* * * * *

Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under the present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that *the total weekly benefits may not exceed the actual average weekly wages of the deceased.*

Legislative History, p. 225. (Emphasis supplied). Congressman Daniels spoke in support of the bill on October 14, 1972, and stated, in part, as follows:

> Mr. Speaker, I would like to go into the major provisions of the bill.
>
> A basic requirement of the act is for the injured worker to receive 66 2/3 percent of his average weekly wage. As the result of the 12 year freeze,

very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage* to be determined by the Secretary of Labor.

* * * * *

It provides increased benefits to widows and dependent children.

* * * * *

It provides increased benefits to survivors of workmen killed as a result of job injuries.

* * * * *

Legislative History, p. 286. (Emphasis supplied). Congressman Steiger, on October 14, 1973, stated, in part, as follows:

Mr. Speaker, I rise in support of this much-needed improvement in the Longshore Compensation Act.

Because the time is so short my extension will include a series of questions and answers which discuss the most substantive issues included in this bill.

* * * * *

The questions and answers follow:
(Legislative History, pp. 297-298)

* * * * *

Question. Do the amendments change the death benefits?

Answer. Under present law, the maximum allowed for funeral expenses is $400. The bill raises this maximum to $1000. Also, a surviving

wife or dependent husband is now entitled to compensatory payments equaling 35 percent of the deceased's average wage, and 15 percent of the deceased's average wage for each dependent child. The percentage for the surviving spouse is raised by the bill to 50 percent and the percentage for each dependent child is raised to 16 2/3 percent. The Act's present total compensation maximum of 66 2/3 percent of the deceased's average wage is retained . . .

Legislative History, p. 301. Prior to final action in the Senate, Senator Williams, a cosponsor of S.2318 made in part, the following remarks:

* * * * *

. . . This legislation represents the *first serious step toward reform of our society's workmen's compensation laws in the past 50 years.*

* * * * *

. . . Last Year there were more than 109,000 injuries in this statute; 240 workers covered by the act were killed . . . . *(Legislative History*, p. 371).

* * * * *

The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

In the limited but significant area covered by the Longshoremen Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendations and I certainly expect to use the improvements in this bill as a model. *(Legislative History*, p. 372).

* * * * *

The bill amends the act to provide that the maximum compensation for disability shall not exceed 200 percent of the national average weekly wage . . . (*Legislative History*, p. 374).

* * * * *

The benefit structure for survivors is altered to provide additional benefits for widows and children . . . The amended Act will provide a 50 percent award to surviving wives or husbands and 16 2/3 percent to the children, subject to a maximum of 66 2/3 percent of the average weekly wages. . . . *(Legislative History*, p. 375).

The foregoing analysis of the hearings concerning the 1972 amendments of the Act establishes unquestionably that the Congress, from the opening days of the hearings, considered the advisability of eliminating maximums as to death and disability, and received voluminous testimony on that proposal. From the beginning, the proposed amendments to the Act, by S.2318, expressed only a minimum benefit and did not express a maximum. The latter was merely excised in the bill's language. Although Section 6 was substantially rewritten in the revised S.2318 to include a maximum benefit for disability, tied to the national average weekly wage, Section 9(e) was not so revised. As finally passed by the Senate and House of Representatives, Section 9(e) read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Legislative History, p. 555. Section 9(e) as proposed by the original S.2318 stated:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

Hearings, p. 10. A comparison of the language above indicates a striking similarity. The method of expressing the minimum and the method of removing the maximum is identical. Yet, Section 9 *was* amended, so that the minimum benefits would be tied to the national average weekly wage, a term that was added to the revised S.2318.

It is clear, then, that when redrafting S.2318, the death benefit section was reviewed and changed. The redrafters, however, made no mention of any maximum death benefit in Section 9(e). It is respondents' submission that the omission of any reference to death benefit maximums in Section 9, where such maximums had traditionally and exclusively appeared since the inception of the Act, was a conscious and deliberate action by the Congress, expressing its desire to remove any arbitrary ceiling on this class of benefits.

B. Report of the National Commission on State Workmen's Compensation Laws

In the Senate Report under the heading "Maximum and Minimum Benefit Amounts" the Report states in part as follows:

> Section 5 of the Bill amends the Act to provide that the maximum compensation *for disability* shall not exceed 200 percent of the national average weekly wage to be determined annually by the Secretary of Labor . . . These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws.

Legislative History, p. 67. (Emphasis supplied). Taken in context then, this reference to the Report of the National Commission is mentioned only with respect to maximums for disability. As Judge Devaney noted in his opinion: "The reference is not repeated in the following section entitled 'Survivor Benefits'. Fed.Pet, p. 59A.

Nevertheless, a review of the Report's discussions of maximum and minimum limitations is instructive. At 37,38, the Report discusses, under the heading "Disability Benefits," maximum and minimum limitations, in part, as follows:

* * * * *

> While workmen's compensation benefits should be a substantial proportion of the worker's lost remuneration, there are reasons to set minimum and maximum weekly cash benefits. A low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers. To avoid committing such a worker to dependence on welfare, a

> minimum weekly payment may be needed. Of course, if another program, such as a family income maintenance program, were to guarantee a basic level of income for all workers, there might be no need for minimum benefits under workmen's compensation.
>
> *The arguments for maximum benefit are more troublesome.* As long as benefits are linked to the losses in net remuneration caused by the work-related impairment, the task of providing incentives for return to work should be no more difficult for a worker with high earnings than for others. To argue that maximum benefits will reduce the costs of the program for employers is to ask disabled high-wage workers to bear a high proportion of their own lost remuneration. A somewhat more appealing argument for maximums is that highly paid workers presumably are able to provide their own insurance and to make decisions about risks. A maximum limit on benefits would provide high-income workers an opportunity to design their own insurance programs: if, for example, the maximum benefits would replace only half of a high-wage worker's lost remuneration, he may choose to increase his private insurance. Another *possible argument* for maximums is *that if one conceives of workmen's compensation benefits being paid out of a fixed fund*, then other uses for the fund, such as an extended duration for permanent total benefits, may have a greater priority than the replacement of a high proportion of lost remuneration for well paid workers. A final argument is that if workmen's compensation engages in some income distribution to the low-age workers through the device of minimum benefits, then the same philosophy justifies in-

come redistribution at the expense of high-wage workers. We are not totally unsympathetic to this philosophy, but we emphasize again that the primary purpose of workmen's compensation is to provide insurance against interruption of income, not welfare or income redistribution. *We conclude that there is an uneasy case for maximum and minimum benefits* as long as they do not distort the primary insurance function of workmen's compensation. (Emphasis supplied).

* * * * *

The Commission, then, found at best an "uneasy case" for minimum and maximum benefit levels, and that of the two, maximums were "more troublesome."

At pages 71, 72, the Report discusses death benefits, in part, as follows: (Emphasis supplied).

* * * * *

E. DEATH BENEFITS

Work-related deaths account for less than one percent of all workmen's compensation claims and less that 10 percent of all benefits. *As the ultimate tragedy, work-related death deserves full compensation.* The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

The Porportion of Lost Remuneration to be Replaced

* * * * *

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities,

the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66-2/3 percent of lost wages is appropriate. The considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.

* * * * *

Maxiumum Weekly Benefit

The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

R3.23

We recommend that as of July 1, 1973, the *maximum* weekly death benefit be *at least* 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be *at least* 100 percent of the State's average weekly wage.

R.3.24

We recommend that as of July 1, 1977, the *maximum* weekly death benefit be *at least* 133-1/3 percent of the State's average weekly wage; as

of July 1, 1979, the maximum should be *at least* 166-2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be *at least* 200 percent of the State's average weekly wage.

* * * * *

A number of comments must be made concerning the Commission's discussion of death benefits. First, in the opening paragraph, the Commission states that death "the ultimate tragedy . . . deserves full compensation." Then, in the discussion of the proportion of lost remuneration to be replaced, the Commission suggests that the percentage be greater than in the case of disability payments. Finally, the maximums recommended by the Commission for death benefits were *minimum* recommendations. Each percentage of the State's average weekly wage that is proposed as the maximum benefit is preceded by the phrase "at least." Thus, at p. 71 of the Report, the Commission recommends that "as of July 1, 1979, the maximum (death benefit) should be *at least* 166-2/3 percent of the State's average weekly wage." Devaney recognized and cited this fact in his decision and order. Fed. Pet. at p. 60A.

The commission's discussion of death benefits, then, establishes that the Commission contemplated benefit levels in death cases that would be greater than disability benefit levels, and in fact felt that desirable.

C. Section 6(d)

It has been suggested that Section 6(d) affects the level of death benefits. Section 6(d) contains no language specifying a death benefit maximum. No death benefit maximum is set out any where in the Act, as amended in 1972, except for the provisions of Section 9(b) which state that the maximum percentage of average weekly wages payable as death benefits be 66-2/3's thereof.

A reference to the legislative history is not necessary where the language of the statute is clear on its face. *United States v. Oregon*, 366 U.S. 643, 81 S. Ct. 1278 (1961). However, because death benefits are mentioned in Section 6(d) and because the text is somewhat obscure, the prior tribunals in this case have examined the legislative history and the language of the amended Act to discern the meaning of this section.

Section 6(d) is designed to specify that only permanent total disability and death benefit recipients are to receive enhanced benefits period to period if the national average weekly wage increases. The other classes of disability recipients do not receive such enhancements.

As an example, a high income, temporary total disability recipient has his benefits limited by the Section 6(b)(1) maximum of 200 percent of the national average weekly wage. The exact amount will depend on which period he is awarded such benefits. If this recipient's disability continues into the *next* period, though, are his benefits increased, presuming an increase in the national average weekly wage?

Section 6(b)(1) states that the compensation for disability "shall not exceed the following percentages of the applicable National Average Weekly Wage as determined by the Secretary under paragraph (3): . . . (D) 200 percentum beginning October 1, 1975." Section 6(b)(3) referred to directly above specifies the method by which the Secretary of Labor determines the national average weekly wage, and that such wage is redetermined each year.

Section 6(b) then is inconclusive on this question. It could be read either way: that maximum disability payments are to be increased period to period pursuant to an increasing national average weekly wage, or that the disability recipients are frozen at the level of compensation when awarded.

Section 10(f) does not answer this query either. Section 10(f) provides that permanent total disability and death benefit recipients are to receive enhanced benefits period to period based upon an increasing national average weekly wage. Other classes of disability are not mentioned, but this is not conclusive, for Section 10(f) is designed to provide that *all* recipients of permanent total disability and death benefits shall receive such enhancements. For if it is presumed that there is no Section 10(f) and the new national average weekly wage is substituted each period to figure benefits, then only some minimum death benefit recipients and some minimum and all maximum recipients for disability would get such increases. Those recipients whose benefits are figured pursuant to the employee's average weekly wage would not get such increases. Section 10(f) then "fills the gap" with respect to permanent total disability and death benefits, providing that the entire range of such beneficiaries receive benefit enhancements based on the national average weekly wage.

The answer concerning the temporary total disabled worker then is not answered by either Section 6(b) or Section 10(f). The only other section that concerns this query is Section 6(d):

> (d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

As has been noted elsewhere, "determinations" are not defined in the Act. However, in the only bit of legislative history that clearly discussed Section 6(d), it is stated that such determinations are of national average weekly wage.[4]

[4]S.Rep. 92-1125, *Legislative History* p. 80. Specifically, in the Section by Section Analysis of revised S.2318 the Senate Report said of Section 6(d): "Subsection (d) states that determinations of *National Average Weekly Wage* made with respect to a period apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, *as well as those who begin receiving compensation for the first time during the period.*" (Emphasis supplied). See also Devaney, Fed.Pet. at p. 58A.

Section 6(d) provides that the determinations of national average weekly wage are to apply to those "currently receiving" benefits as well as those "newly awarded" benefits during the period. The determinations, it should be noted, are with respect to "a period," not "the phase-in period" or "a specific period."

Section 6(d)'s purpose, then, is discerned. The Congress wished to treat permanent total disability and death benefit recipients specially, and did so by virtue of Section 10(f). Recognizing, though, that a question remained as to other classes of disability receipients. Congress inserted Section 6(d) to explain that those classes of beneficiaries are in effect frozen at the levels of benefits they are awarded.

It is thus clear that Section 6(d) has nothing whatsoever to do with setting a death benefit maximum.

II. CASE LAW AND THE RULES OF STATUTORY CONSTRUCTION SUPPORT THE FINDING OF NO DEATH BENEFIT MAXIMUMS IN THE ACT, AS AMENDED

The 1972 amendments to the Act were remedial in nature, designed to remove inequities that existed in the Act. One of the main purposes was to greatly enhance benefits to workers. *Hearings*, p. 2. As such, the amendments, as with the statute from its origins in 1927, were beneficent in nature and humanitarian of purpose. This Court has long recognized the beneficent nature of the Act, and has ruled that the Act should be liberally construed in light of such purpose. *Northeast Marine Terminal Company, Inc. et al v. Caputo*, 97 S.Ct. 2348 (1977); *Reed v.*

Steamship Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), *rehearing denied*, 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963); *Voris v. Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953); *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S.Ct. 223, 96 L.Ed. 225 (1951); see also, *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Calbeck v. A.D. Suderman Stevedoring Co.*, 290 F.2d 308 (5th Cir. 1961); *Old Dominion Stevedoring Corp. v. O'Hearne*, 218 F.2d 651 (4th Cir. 1955); *Blackwell Construction Co. v. Garrell*, 352 F.Supp. 192 (D.D.C. 1972); *Page Communications Engineers, Inc. v. Arrien*,315 F.Supp. 569 (E.D.Pa.1970); *Holland America Insurance Co. v. Rogers*, 313 F.Supp. 314 (N.D.Cal.1970); *Gibson v. Hughes*, 192 F.Supp. 564 (S.D.N.Y.1961).

Further, doubts are to be construed in favor of the employee and his family. *Friend v. Britton*, 95 U.S.App.D.C.139, 220 F.2d 820 (1955), *cert. denied*, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 745 (1955); *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11 (1940), *cert. denied*, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940); *Grain Handling Co. v. McManigal*, 23 F.Supp. 748 (W.D.N.Y.1938); *aff'd* 102 F.2d 464 (2 Cir.), *cert. denied*, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478 (1939).

The rules of statutory construction are in accord.[6]

Although the Act is to be liberally construed in favor of the workers and their families, the function of statutory interpretation by the judiciary is not to be exceeded. The power to make, alter or repeal statutes is legislative. *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 81 S.Ct. 557 (1960); *Northern Securities Co. v. United States*,

[6]Sutherland, *Statutory Construction*, by Sands, 4th Ed., 1972 at Sec. 58.04 states that statutes which are enacted to relieve personal disadvantages, hardship and suffering are generally accorded generous judicial acceptance and liberal construction. "Illustrative are laws granting rights to laborers, debtors, and the poor."

193 U.S. 197, 24 S.Ct. 436 (1903)). As such, the courts do not encroach upon a coordinate branch of government by enlarging or altering legislative enactments. *Ebert v. Poston*, 266 U.S. 548, 45 S.Ct. 188 (1924). Adding words or interpolating words that the legislature has omitted are examples of the type of alteration of statutes that the courts will avoid. *Id.*, *Pirie v. Chicago Title and T. Co.*, 182 U.S. 438, 21 S.Ct. 906 (1900). Even where the result might be considered ill-advised, this court will not reverse a clear statutory expression of Congressional intent. *Tennessee Valley Authority v. Hill*, U.S.S.C. No. 76-1701, 46 Law Week 4673 (Decided June 15, 1978).

To read a death benefit maximum into the Act as amended this Court must insert such language, for it simply does not exist, either in Section 9 or Section 6. As stated earlier, Section 6(d), while admittedly containing the words "death benefits," does not contain any language indicating a death benefit maximum. It is respondents' submission that such insertion would be beyond the bounds of judicial interpretation of statute, and would be creation of statute.

It is unquestionably more beneficent for a statute such as the Act to provide death benefits to the survivors of workers that are killed during the course of their employment in amounts that are unfettered of arbitrary ceilings.

One of the primary reasons for workers' compensation statutes replacing less than the full wage is that such practice offers an incentive to the injured worker to return to productivity.[7] The case is of course entirely different if the

[7]Report of the National Commission, p. 71. Such principle holds true for all classes of disability. If, for example, an injury causes the loss of a hand and an eye, or a hand and a foot, or both feet, the Act provides that such injuries, absent conclusive proof to the contrary, are considered permanent and total. Section 8(a) 33 U.S.C. §908(a). Such injuries are terrible tragedies, but it is conceivable that workers so injured could return to productive, useful lives. It should also be noted that such injuries, after a healing and convalescent period, would not require continued care.

worker dies. In such case the incentive reasoning has no application; the argument for maximums and other limitations on benefits becomes more difficult to sustain. Hence, removing the ceilings on death benefit maximums has a rationale, and is consistent with the humanitarian concepts of the Act.

III. DECISION OF THE NINTH CIRCUIT

The decision of the United States Court of Appeals for the Ninth Circuit[8] represents the most careful review of the entire legislative history of the 1972 amendments to the Act by any circuit court of appeals. That court rightly concluded that when viewing the legislative history as a whole, the intent of Congress is surmised, and that intent was to remove maximums from death benefits.

The Ninth Circuit quite properly interpreted Petitioners' arguments and defined Petitioners' burden of proof:[9]

> The difficulty with petitioners' position is that on its face the language of Section 909(e) is not ambiguous. Their position rests on an assumption that the choice of this unambiguous language by Congress, and its failure expressly to incorporate the maximum limitations of Section 906(b)(1), was inadvertent — that Congress had not meant to say what it had clearly said. The presumption to the contrary is not lightly to be overturned, and in our judgment petitioners have failed to meet their burden in this respect.

Petitioners failed to meet that burden, the court found, because the legislative history reveals how often this very issue was discussed during the hearings on the amend-

[8]*Director, Office of Workers Comp., et al. v. Rasmussen*, 567 F.2d 1385 (1978).

[9]Fed.Pet. at p. 8A.

ments, and because the final amendments to Section 9(e) were so "graphically illustrated". *Id.* at p. 11A.

The Ninth Circuit further gives proper deference to "a course legislatively chosen." *Id.* There the court discusses the suggestion that the removal of death benefit maximums is "so irrational" that it could not have been intended, no matter what the record revealed. The Court rightly finds that greater benefits in death cases had received favorable comment from the National Commission on State Workmen's Compensation. The court avoids substituting its own evaluation of the wisdom of such action, realizing that such action is not properly a function of judicial interpretation of statutes.[10]

In its analysis of the 1972 amendments to the Act, the Ninth Circuit finds another weakness in the argument that Congress must have intended to treat maximum death and disability benefits identically: those amendments result further in more favorable benefits to survivors in some minimum situations. See footnote 8 to the opinion, Fed.Pet. at p. 13A, 14A. The court correctly rejected the major rewriting of the statute that would have been required to bring disability and death benefits into a state of complete harmony.

[10]*Tennessee Valley Authority v. Hill, supra.* At 46 Law Week 4684 the Chief Justice writes: "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." See also *United States v. Public Utilities Comm. of Calif.* 345 U.S. 295, 73 S.Ct. 706 (1953). The D.C. Circuit seems to have avoided this discipline in *Director, Office of Workers Comp. v. Boughman*, 545 F.2d 210 (1976). In finding Section 6(b)(1) maximums apply to death benefits, that court said at 213 that "*[f]oremost* among our reasons for reaching this conclusion is the *common sense conviction* that Congress did not intend" to eliminate death benefit maximums. (Emphasis supplied).

Finally, the Ninth Circuit states what is often overlooked in this case: how simple it would have been for Congress to have provided clearly and unequivocally that the Section 6(b)(1) maximums were applicable to death benefits.[11]

In conclusion, the court stated:[12]

> We conclude that petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitations on death benefits in Section 909(e).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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[11] *Id.* at p. 12A.
[12] *Id.* at p. 14A.